UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

USA REMEDIATION SERVICES, INC.

and Case 5–CA–31524

LABORERS MID-ATLANTIC REGIONAL
ORGANIZING COALITION

Elicia L. Watts, Esq., for the General Counsel.
David M. Kelsey, J.D., of Warrenton, Virginia
for the Respondent.
Michael Barrett, Esq., of Washington, DC for the
Charging Party.

DECISION

Statement of the Case

C. RICHARD MISERENDINO, Deputy Chief Administrative Law Judge. This case was tried in Washington, DC on December 6 – 7, 9 – 13, 2004, and January 24, 2005. The charge was filed on October 14, 2003,[1] and the complaint was issued on January 29, 2004. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by engaging in unlawful surveillance of employees discussing safety and other terms and conditions of employment during their lunch breaks; by unlawfully discouraging employees from discussing these issues and unlawfully threatening to terminate their employment, if they continued to do so; by unlawfully interrogating employee, Miguel Carballo, about his union membership and activities, and unlawfully terminating him for engaging in concerted activities with other employees for the purpose of mutual aid and protection. The Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Charging Party Union, I make the following[3]

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[1] All dates are in 2003, unless otherwise indicated.

[2] On December 13, 2004, after being formally warned and admonished about his conduct on several occasions, David M. Kelsey was excluded for misconduct from further participation as the Respondent's representative. By Order, dated December 14, 2004, the Respondent was directed to select and appoint a new representative, who had experience with the practices and procedures of the Board, and the new representative was directed to file a written appearance by no later than January 7, 2005. (GC Exh. 26.) The Order further stated that the trial would resume on January 24, 2005. The Respondent did not obtain a new representative, did not appear when the trial resumed, and did not file a posthearing brief.

[3] The General Counsel's unopposed motion to correct the transcript, dated March 7, 2005, is

Continued

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, admits and I find that it is engaged in lead and asbestos removal and abatement services with an office and place of business in Warrenton, Virginia. The Respondent annually conducts business from its Warrenton, Virginia office, providing services valued in excess of $50,000 in states other than the Commonwealth of Virginia. The Respondent nonetheless denies that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It failed and refused to produce financial records reflecting commerce information that were subpoenaed by the General Counsel.[4] I draw an adverse inference that the subpoenaed documents would corroborate the admitted allegations affecting interstate commerce and also substantiate the allegation contained in paragraph 2(c) of the complaint. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The Respondent also denies that the Charging Party Laborers Mid-Atlantic Regional Organizing Coalition (Coalition) is a labor organization within the meaning of the Act.

Section 2(5) of the Act defines a labor organization as

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, ….or conditions of work.

In *Vencare Ancillary Service,* 334 NLRB 965, 969 (2001), the Board stated:

> for unrepresented employees collectively to constitute a labor organization under Section 2(5) of the Act: (1) employees must participate; (2) the organization, must exist, at least in part, for the purposes of "dealing with" the employer; and (3) these dealings must concern "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See *Electromation, Inc.*, 309 NLRB 990, 994 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994).
>
> The term "dealing with" contemplates "a bilateral mechanism involving proposals from an employee committee concerning subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management." *Electromation*, supra, 309 NLRB at 995 fn. 21. The Board has required that "dealing with" consist of "a pattern or practice in which a group of employees, over time, makes proposals to management,

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granted and received in evidence as GC Exh. 31.

[4] The Respondent's representative, David M. Kelsey, mislead Counsel for the General Counsel and me over the course of several days by stating that the subpoenaed information was forthcoming and that it would be provided. (Tr. 11 – 14, 19 – 22, 534 – 536.)

> [and] management responds to those proposals by acceptance or rejection." *Stoody Co.,* 320 NLRB 18, 20 (1995), quoting *E.I. du Pont & Co.*, 311 NLRB 893, 894 (1993). "If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing." Id.

The evidence shows that the Coalition is affiliated with the Laborers International Union of North America. (Tr. 279.) Stephen Lanning, the Coalition's director of organizing testified that the Coalition's purpose to assist local unions and district councils in the Mid-Atlantic area in organizing primarily construction workers.[5] (Tr. 279.) Its membership is comprised of local unions and district councils. It is governed by a chairman, secretary, treasurer, and a board made up local union and district council leaders. (Tr. 281.) It employs a paid director of organizing and paid organizers, who are its employees. There is no evidence, however, that individuals, employed by construction contractors, are members of the Coalition. In other words, the evidence does not show that employees of construction contractors participate in the Coalition.

Nor does the evidence show that the Coalition exists for the purpose of "dealing with" construction contractors, whose employees the Coalition is helping the local unions to organize. Although the Coalition may assist a local union in contract negotiations, if the union is selected, the evidence shows that as an organization it is one step removed from "dealing with" the employer on matters concerning "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

I therefore find that the Laborers Mid-Atlantic Regional Organizing Coalition is not a labor organization within the meaning of the Act. The Laborers International Union of North American and its local unions and district councils are the "labor organizations." The Coalition is merely an umbrella entity comprised of local unions and district councils which assists in organizing employees of construction contractors.

III. Alleged Unfair Labor Practices

In mid-June 2003, the Respondent was a subcontractor responsible for demolition and hazardous material removal on a building renovation project called Hochmuth Hall, U.S. Marine Corps Base, Quantico, Virginia (Marine Corps Base project). (Tr. 172, 177.) (Tr. 257.). It effectively was hired to remove everything in the building, tear down the ceilings and walls, and bring the structure back to bare concrete walls.[6]

Eric Woodruff was the Respondent's Project Manager and point of contact with general contractor's superintendent. Rick Sullivan was the Respondent's demolition foreman, who oversaw the demolition project and coordinated with the superintendent in the absence of Woodruff. Robert Garniga, who is bilingual in Spanish and English, was a laborer for

[5] The Mid-Atlantic Region includes the District of Columbia, Maryland, Virginia, Pennsylvania, West Virginia, and North Carolina. (Tr. 280.)

[6] The Whiting-Turner Contracting Company was the general contractor. Christopher Rogers was the general contractor's superintendent and safely coordinator for the Hochmuth Hall project.

Respondent, who served as an interpreter for Woodruff in directing the predominantly Spanish speaking workforce.

A. *The Supervisory Status of Eric Woodruff and Rick Sullivan*

The complaint alleges, but the Respondent denies, that Project Manager Eric Woodruff and Demolition Foreman Rick Sullivan are supervisors within the meaning of Section 2(11) of the Act.[7]

1. The Legal Standard

A supervisor as defined by Section 2(11) of the Act is:

> …any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is read in the disjunctive. The possession of any one of the authorities listed is sufficient to designate an individual vested with this authority as a supervisor, *Mississippi Power Co.,* 328 NLRB 965, 969 (1999), *citing Ohio Power v. NLRB,* 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949), so long as the individual exercises independent judgment in conjunction with those authorities on behalf of management, rather that exercising them in a routine manner. *Clark Machine Corp.,* 308 NLRB 555 (1992). It is settled law, however, that the burden of proving supervisory status is on the party alleging that an individual is a supervisor. *Kentucky River Community Care, Inc.,* 532 U.S. 706, 712 (2001); *Health Care Corp.,* 306 NLRB 63 fn. 1 (1992). Thus, the General Counsel must show that the Woodruff and Sullivan are Section 2(11) supervisors.

2. Eric Woodruff

Eric Woodruff has worked for the Respondent for 10 years and more specifically has been a project manager for the last five or six years. (Tr. 152.) He reports to Tim Shears, an Operational Manager, who in turn reports to Jeffrey Sullivan, the Respondent's president. (Tr. 169 -170.) Woodruff is required to attend supervisor and foremen meetings that are held on a regular basis. (Tr. 234.) He is a salaried employee, who receives benefits, like medical and dental coverage, eye care coverage, paid vacation and use of a company motor vehicle. (Tr. 196, 197.) Laborers or non-management employees are hourly paid and do not receive these benefits.

In June 2003, Woodruff was the project manager on the Marine Corps Base project. (Tr.

[7] The complaint alleges that Rick Sullivan's title was project manager, but the unrebutted evidence show that his official title was demolition foreman. The complaint also alleges that Robert Garniga is a Section 2(11) supervisor. However, in its posthearing brief at page 53–54, the General Counsel only argues that Garniga is a Section 2(13) agent of the Respondent thereby implicitly conceding that the evidence does not support a finding that Garniga is a Section 2(11) supervisor.

172, 177.) He testified that it was his job to "read and understand the plans, make sure that there was enough men and materials on the site in order to accomplish said task, attend meetings with the general contractor and the Government, run my crew." (Tr. 176.) When asked if he received any specific instructions from anyone in order to do his job, Woodruff stated that he was "pretty much autonomous." (Tr. 176, 241.) This evidence, alone, supports a reasonable inference that Woodruff exercised independent judgment in performing his duties on the project.

Woodruff further stated that he was the Respondent's interface with the general contractor, Whiting and Turner. (Tr. 258-259.) He submitted daily work logs to the superintendent, Chris Rogers, showing the work his crew had completed and the work that remained to be done. (Tr. 178 –179, 259.)

With respect to hiring, Woodruff's testimony concerning his authority to hire employees was contradictory. Initially he stated, "I don't look at peoples applications. I don't do any hiring." (Tr. 202.) A few minutes later, he testified that he accepted employment applications on the jobsite and if work was available he would tell the applicant that he could start work on a date certain, contingent upon the front office in Warrenton approving the applicant's paperwork. (Tr. 208.) By giving the applicant a start date, contingent upon the front office approval, the evidence supports a reasonable inference that Woodruff is involved in the hiring process and effectively recommends hiring.

Woodruff further testified that he recommends employees for pay increases and is responsible for disciplining workers. (Tr. 211.The discipline could be a suspension or termination depending on the circumstances. (Tr. 214.) He does need approval from the front office in Warrenton, prior to or after issuing the discipline. (Tr. 215.)

Based on the evidence viewed as a whole, I find that Eric Woodruff is a supervisor within the meaning of Section 2(11) of the Act.

3. Rick Sullivan

Rick Sullivan reported to Woodruff on the Marine Corps Base project. (Tr. 170.) He was a salaried employee and he received the same benefits as Woodruff .[8] (Tr. 227-228.) Woodruff unpersuasively testified that he was unsure whether Rick Sullivan was managerial, supervisory, or a foreman. (Tr. 154.) However, he subsequently stated that Rick Sullivan was a demolition foreman on the Marine Corps Base project with responsibility for overseeing and directing a crew working in the basement of Hockmuth Hall. (Tr. 176.) Woodruff testified that Rick Sullivan was authorized to "do what he had to do" in the basement. (Tr. 181.) Sullivan assigned work and closely supervised the laborers. (Tr. 367-368.) He maintained a separate daily work log showing the work his crew completed in the basement, which he gave to Woodruff, who submitted it to the general contractor. (Tr. 180, 194.) In addition, the unrebutted evidence shows that whenever Woodruff was absent from the project, Rick Sullivan substituted for him and interfaced with the general contractor. (Tr. 259, 260.) Thus, the evidence reflects that Rick Sullivan exercised independent judgment in assigning work, directing his crew, and representing the Respondent in dealings with the general contractor.

Rick Sullivan was subpoenaed by the General Counsel to testify at the trial, but did not appear. (GC Exhs. 18 and 19.) No explanation was given for his absence. In her posthearing

[8] The evidence shows that Rick Sullivan was the older brother of Jeffrey Sullivan, the Respondent's president.

brief at page 54, n. 58, counsel for the General Counsel asserts that an adverse inference should be drawn that Rick Sullivan's testimony would be unfavorable to the Respondent on the issue of whether he is a supervisor within the meaning of the Act. The familial relationship between Rick and Jeffrey Sullivan, the Respondent's president, supports a reasonable presumption that Rick Sullivan would give favorable testimony on behalf of the Respondent had he appeared and testified at trial. His failure to appear therefore gives rise to an adverse inference that his testimony on the supervisory issue would have been unfavorable. I agree and I draw an adverse inference.[9]

The evidence viewed as a whole shows that Rick Sullivan used independent judgment in overseeing, assigning, and directing the crew performing demolition work in the basement of Hockmuth Hall. He was also the point person on the job in the Woodruff's absence, interfaced with the general contractor, and issued directions to the entire workforce at those times. Accordingly, I find that Rick Sullivan was a supervisor within the meaning of Section 2(11) of the Act.

In addition, it is alleged and argued, and I find, that Rick Sullivan was an agent on the Respondent within the meaning of Section 2(13) of the Act. *Great American Products,* 312 NLRB 962, 963 (1993). The undisputed evidence shows that Rick Sullivan as a demolition foreman for the Respondent directed the basement crew and periodically served as the Respondent's point person for the entire jobsite. Thus, the evidence shows that because of his position and conduct, the general contractor and the employees, i.e., the third parties, could reasonably conclude that Rick Sullivan was acting on behalf of the Respondent as an agent within the meaning of Section 2(13) of the Act.

B. *The Agency Status of Robert Garniga*

1. Facts

Robert Garniga was a laborer, who spoke both English and Spanish. (Tr. 198-199.) An hourly paid employee, the evidence shows that he made two dollars an hour more than the other laborers. (Tr. 198.) Eric Woodruff described Garniga as a valuable translator. Because the work crews were comprised of primarily Spanish speaking laborers, and because neither Woodruff nor Rick Sullivan spoke Spanish, Woodruff directed the crews through Garniga. (Tr. 203-204.) Woodruff told Garniga what he wanted the crew to do in English, and Garniga relayed the instructions to the crew in Spanish. Woodruff testified that at times he was present when Garniga instructed the crew in Spanish and other times, he was not present. (Tr. 204-205, 330.) When crew members had questions, they spoke to Garniga in Spanish. He translated the question to Woodruff in English, obtained the answer, and reported the information back to the crew in Spanish.

The evidence also shows that Garniga served as an interpreter at regularly held safety meetings. (Tr. 206, 327, 361-362, 369-370.) According to the unrebutted testimony of Miguel Carballo, at the end of the first safety meeting he attended as a new employee, Woodruff told all the employees through Garniga that Garniga was a supervisor. (Tr. 329, 362.) Carballo also observed Garniga assigning work to employees and checking on their progress. (Tr. 331, 333.)

[9] Counsel for the General Counsel also asserts that an adverse inference should be drawn because Respondent failed to produce documents concerning Rick Sullivan in response to document subpoena request nos. 9 and 10. In particular, the Respondent failed and refuses to produce the Rick Sullivan's salary records. I therefore draw an adverse inference on this basis.

Laborer Elberto Vega further testified that he considered Garniga to be a boss. (Tr. 86-88.)

Garniga was served at the Respondent's place of business with a witness subpoena from the General Counsel, but failed to appear and testify. Counsel for the General Counsel asserts that because he failed to appear as a witness an adverse inference should be drawn that his testimony would be unfavorable to the Respondent concerning his alleged agency status. I decline to draw an adverse inference on the ultimate issue of agency in the absence of persuasive evidence showing that Garniga more than likely would have testified favorably for the Respondent had he appeared in response to the subpoena.

In addition, counsel for the General Counsel asserts that an adverse inference should be drawn from the Respondent's failure to provided subpoenaed documents. Specifically, the General Counsel's document subpoena request nos. 8 – 11 seek information concerning, among other things, Robert Garniga's terms and conditions of employment and duties. The evidence reflects that documents responsive to request nos. 8, 9, and 10 were provided and that no documents purportedly existed in response to request no. 11. (Tr. 14-16; GC Exh. 2 and 3.) At trial, Counsel for the General Counsel did not assert that the documents provided were not responsive to the requests or that any request needed to be supplemented. Thus, under the circumstances, there is no basis for drawing adverse inference.

2. Analysis and findings

The complaint alleges, and the General Counsel argues, that Robert Garniga is an agent within the meaning of Section 2(13) of the Act. The Respondent denied the allegation in its answer.

Section 2(13) of the Act provides that:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Great American Products,* 312 NLRB 962, 963 (1993). Where an employer regularly communicates with its non-English speaking employees through a bilingual employee-interpreter, the Board has held that the employer has made the employee-interpreter its agent for purposes of communication. *Poly-America, Inc.,* 328 NLRB 667 (1999); *Cream of the Crop,* 300 NLRB 914 (1990).

The undisputed evidence shows that Garniga was a conduit for the Respondent, who at Woodruff's direction told the employees what to do and when to do it. In return, the employees sought direction and clarification through Garniga. (Tr. 112, 134-135.) He was perceived by the employees as a "boss," the person second in command to Woodruff. (Tr. 88, 89-90, 118.) There can be no other conclusion than the employees reasonably believed that Garniga was speaking and acting on behalf of the Respondent. Accordingly, I find that Robert Garniga was an agent within the meaning of Section 2(13) of the Act.

C. *The Marine Corps Base Project*

1. Safety Concerns

In mid-June 2003, the Respondent's crews began demolishing Hockmuth Hall. They removed the entire contents of the building and tore down the ceilings and the walls. The laborers worked in areas surrounded by construction debris.

Chris Rogers, the general contractor's superintendent, was also the project safety officer. He frequently walked through the building to make sure that the workers were wearing hard hats and safety goggles, and that safety standards were being maintained. On several occasions, Rogers found the Respondent using electrical extension cords that did not have ground prongs. Rogers testified that when he found an unsafe extension cord he would cut it so the cord could no longer be used. (Tr. 263, 264.) On occasion, Rogers also cited the Respondent for not bending or removing the nails in demolished boards.

Rogers testified that he had a three strike policy for safety infractions, which consisted of a verbal warning, a first written warning, and a second written warning. Receipt of a second written warning resulted in removal from the jobsite. According to Rogers, Demolition Foreman Rick Sullivan was a repeat safety violator, who was given three safety warnings and was removed from the project for one-week. (Tr. 264-265.)

2. Carballo is hired

Miguel Carballo is, and was, a paid union organizer for Local 11, MAROC (Tr. 316-317, 357.) He covertly applied for a job on the Marine Corps Base project and was hired. On June 16, 2003, he began working for the Respondent as a laborer. (Tr. 325.)

Carballo wasted no time reporting unsafe working conditions to Eric Woodruff, the Respondent's project manager. Specifically, he reported that certain extension cords were unsafe and complained to Woodruff about a lack of drinking water for the crew. (Tr. 334, 335.387-388.) Carballo also sought drinking water for employees from Rogers, the general contractor's superintendent. (Tr. 94-95, 388-389.)

The crews typically took their lunch break in a small grassy area immediately in front of Hockmuth Hall. (Tr. 373.) Woodruff's first floor office overlooked the grassy area. (Tr. 373-374.) After a week or so on the job, Carballo began talking to the workers during the lunch break about the Union and unsafe working conditions. (Tr. 43, 48, 378.) He told them about the benefits of joining the Union and talked with them about the unsafe working conditions and insufficient drinking water. (Tr. 93, 376, 378, 379.)

Carballo was off work from July 1-7 to assist his wife with their newborn baby. (Tr. 379.) When he returned to work on July 8, Carballo resumed his lunchtime activity of discussing the benefits of joining the Union with the employees. Notably, Robert Garniga, who normally ate lunch in his vehicle, joined the group. (Tr. 380, 393, 395.) Garniga asked questions about medical insurance and Union training classes. He also questioned Carballo's assertions about the benefits of joining a Union. (Tr. 386.) On Thursday, July 10, Garniga told Carballo during the lunch break that he did not believe everything that Carballo told the group about the Union, got up, and walked away. A few minutes later, as the workers were returning to work, Carballo saw Garniga in Woodruff's office. Later that afternoon, Carballo was assigned to work with Garniga.

3. Carballo is fired

The next day, Friday, July 11, Carballo arrived at work, attended a regularly scheduled safety meeting, and again was assigned to work with Garniga in the basement. (Tr. 396-397.) At approximately 7:10 a.m., Garniga sent Carballo upstairs to get a hammer from the warehouse area of the building. The warehouse area was located adjacent to Woodruff's office, and the two areas were separated by a partition wall that did not extend to the ceiling. In other words, there was an open space between the top of the wall and the ceiling.

Standing in the warehouse area, Carballo was unable to see into the office. (Tr. 399.) However, he could hear Woodruff telling Rick Sullivan that he, Carballo, was talking to the employees during lunch about Union benefits and safety. (Tr. 399, 401.) Woodruff told Rick Sullivan that he reported this information to the Warrenton office and that he was waiting instructions on what to do. Carballo took the hammer and went back to work.

A few hours later, Garniga told Carballo that Woodruff wanted to speak with him outside. (Tr. 402.) Woodruff met Carballo in a parking area in front of the building. Rick Sullivan was also present. (Tr. 406.) There are differing versions of the conversation that followed.

According to Carballo, Woodruff told him that it was his last day of work. When he asked Woodruff if he had any complaints about his work, Woodruff told him, "No." (Tr. 404.) Carballo testified that Woodruff told him that he was being discharged for talking to the other employees during lunch breaks about safety issues and the Union. (Tr. 404.) Carballo told Woodruff that it was his free time and that he was only trying to keep the employees from getting hurt on the job. (Tr. 405.) Carballo testified that Woodruff told him that it was bad for the Company because the production would slow down. Woodruff reiterated that Carballo was fired and added that the superintendent, Chris Rogers, agreed with the discharge decision.

Woodruff testified that he came upon Carballo outside talking on his cell phone "walking across the courtyard not doing his job inside the building ...." (Tr. 220, 223.) He stated that twice before he told Carballo not to use his cell phone on the job, but that Carballo simply shrugged it off. (Tr. 244.) Woodruff stated that this time, the third time, he told Carballo, "I told him this is the third and last time you're on the phone, you know, this just can't happen anymore." (Tr. 245.) Woodruff testified that the cell phone was the only reason he gave Carballo for firing him. (Tr. 251.) He also testified that Rick Sullivan was present when he fired Carballo. (Tr. 222.)

Carballo testified that he went to the office trailer of Whiting & Turner to speak with Rogers. (Tr. 407.) He told Rogers that Woodruff fired him for talking about Union issues and safety issues. He also told Rogers that Woodruff told him that he, Rogers, agreed with the discharge decision. (Tr. 408.) According to Carballo, Rogers denied discussing the discharge with Woodruff and denied that he supported the decision.

Carballo left the trailer and walked back to Woodruff and Rick Sullivan. He told Woodruff that Rogers denied that he agreed with the discharge decision. Woodruff reiterated that Carballo was fired. Carballo testified that when he asked for his final paycheck, Woodruff told him, "the Union f_ _king – this is not a union job." (Tr. 410.) At that point, Rick Sullivan asked Carballo whether he belonged to the Union and Carballo responded affirmatively. (Tr. 411.) Rick Sullivan uttered a vulgarity and walked into the building.

Woodruff testified that Carballo became very upset and threw his hard hat on the ground. (Tr. 244-245.) Rogers confirmed that Carballo appeared very agitated, so he called the military police to escort Carballo off the jobsite as a precaution. (Tr. 276.) Although Carballo

denied being verbally or physically abusive and further denied throwing his hard hat, the corroborative testimonies of Woodruff and Rogers credibly reflect that Carballo was upset and agitated about being discharged. (Tr. 414.)

Later that day, after Carballo left the jobsite, Robert Garniga told employee Elberto Vega that Carballo was fired "because he talked too much about the Union." (Tr. 100-101.) Vega credibly testified that Woodruff also told him that Carballo was fired because of "his part in the Union." (Tr. 101.)

4. Credibility Resolutions

Carballo testified that Woodruff told him that he was fired for talking to the other employees during lunch breaks about safety issues and the Union. He further testified that Woodruff stated that these discussions were bad for the Company because they slowed production down. In contrast, Woodruff testified that he told Carballo at the time of firing that he was being discharged for his repeated use of a cell phone during working hours.[10] In response to a leading and carefully worded question from the Respondent's representative, Woodruff denied that he knew "Carballo was associated with any union whatsoever" when he fired him. (Tr. 240-241.)

First, Woodruff's denial that he did not know that Carballo was "associated with a union" when he fired him is beside the point and of no significance. The issue is whether Carballo was fired for "talking" about the Union with the employees at lunch. Woodruff did not deny knowing at the time of discharge that Carballo was talking with the employees about the benefits of a Union or testify that he had no knowledge that Carballo has been telling the employees about Union benefits during the lunch break.

Second, Carballo's testimony that he was told he was being fired for talking about the Union and safety to the employees is supported by the unrebutted testimony of Elberto Vega, who credibly testified that on the day Carballo was discharged, Woodruff told him that Carballo had been fired because of "his part in the Union." (Tr. 101.) Vega further testified that on the same day, July 11, 2003, Robert Garniga also told him that Carballo was discharged because he talked too much about the Union. (Tr. 100-101.)

Finally, Woodruff testified that Demolition Foreman Rick Sullivan, a Section 2(11) supervisor, was present when he fired Carballo. (Tr. 222.) Rick Sullivan failed to appear and testify in compliance with a subpoena served on him by the General Counsel. I find that the circumstances warrant an inference that Rick Sullivan's testimony would not have supported Woodruff's assertion that he told Carballo he was firing for using a cell phone. Rather, from his failure to appear and testify, I draw an adverse inference that Rick Sullivan's testimony would have corroborated Carballo's testimony that Woodruff told him that he was being discharged for talking to the other employees during lunch breaks about safety issues and the Union.

Likewise, Robert Garniga, an agent of the Respondent, failed to appear and testify in compliance with a subpoena served on him by the General Counsel. I find that the circumstances warrant an inference that Garniga's testimony would have supported Carballo's testimony that he was discharged for talking about safety and the Union during non-work hours.

[10] Woodruff also testified that when he fired Carballo, he did not mention safety and nonperformance as additional reasons for discharge. (Tr. 251.)

For these reasons, I credit Carballo's testimony that at the time of discharge, Woodruff told him that he was being fired for talking to his coworkers during lunch break about safety and the Union.

In an effort to show animus, General Counsel relies in part on the testimony of a witness, Irma Mercado, who testified that one day she went to the Respondent's office on the Marine Corps Base project to pickup an extension cord. (Tr. 51.) She testified that she overheard Woodruff, who was talking on the telephone in English, tell someone that Carballo was a "dangerous" person. (Tr. 49.)

Mercado was confused and appeared very distracted at the hearing.[11] At one point, she testified that the telephone conversation she overhead took place in August 2003, which would have been after the discharge. She later testified that she over heard the telephone conversation before Carballo was fired (July 2003).

Mercado speaks and understands very little English. She required an interpreter at the hearing. Through the interpreter she testified that she heard Woodruff tell someone in English that Carballo was a dangerous person, but she did not testify that he used that very word nor did she repeat in English the exact word or words spoken by Woodruff. While I do not doubt that she heard Woodruff make a remark about Carballo, I am unable to discern exactly what the remark was and when it was made. I therefore give no weight to this part of Mercado's testimony.

D. *Alleged Unlawful Rule and Threat*

Paragraph 6 of the complaint alleges that on July 11, 2003, Eric Woodruff violated Section 8(a)(1) of the Act by telling Miguel Carballo that it was bad for the Company to discuss safety issues and terms of employment with other employees and threatening to discharge him for doing so. In its posthearing brief at page 56-58, the General Counsel effectively argues that the Respondent had a published rule or ad hoc declaration prohibiting employees from discussing wages and other terms and conditions of employment and that it threatened to discharge Carballo for violating the rule. In support of its theory, the General Counsel cites several cases in which the employer actually promulgated and maintained a written or verbal rule prohibiting employees from discussing salaries and other terms of employment. I find that neither the evidence nor the law cited by the General Counsel support an independent 8(a)(1) violation for the following reasons.

There is no evidence that the Respondent had a written or verbal rule prohibiting employees from discussing wages or other terms and conditions of employment with each other. There is no evidence showing that the Respondent told any employees that they were not allowed to discuss these matters. There is no evidence that the Respondent threatened to discipline or discharge any employee for breaching such a rule or that Woodruff told Carballo that he was being discharged for breaching such a rule.

[11] Mercado apologetically explained that it was difficult to concentrate because she was tired, had traveled from out of state to testify at the hearing, and that she was preoccupied by family problems at home. Her confusion and concentration difficulties, based on my observations, were compounded by the surly, rude, and agitated behavior of Respondent's representative, David Kelsey, who was repeatedly warned about his conduct. (Tr. 54, 56, 58-59.)

Instead, the evidence shows that on a daily basis for almost two weeks Carballo discussed with the employees during lunch breaks safety and the benefits of joining the Union. These discussions took place outside the building on a grassy area in front of the window to Woodruff's office. Garniga participated in a few of these discussions. At no time did Woodruff, Rick Sullivan or any other management official prohibit Carballo or any other employee from holding these discussions or threaten to discipline them for doing so.

Accordingly, I shall recommend the dismissal of the allegations in paragraph 6 of the complaint.

E. *Unlawful Surveillance*

Paragraph 5 of the complaint alleges that the Respondent engaged in unlawful surveillance when Robert Garniga joined the employee for lunch and questioned Miguel Carballo about the benefits of having a union.

An employer's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991). However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary" and thereby coercive. *Sands Hotel & Casino,* 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.R.R., Inc. v. NLRB,* 993 F.2d 913 (D.C. Cir. 1993). Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. Id.

The undisputed evidence shows that Carballo and the other employees ate lunch outside the building on a grassy area in front of the window to Woodruff's office. His discussions with the employees were in plain view of the employer. The unrebutted credible evidence shows, however, that Robert Garniga, who the employees perceived to be a "boss" or supervisor, routinely ate his lunch in his vehicle. Thus, it was "out of the ordinary" for him to join the other employees for lunch and to participate in the discussion with Carballo about the Union.

In addition, the evidence shows that on the second day that Garniga ate lunch with the employees, he challenged the accuracy of Carballo's assertions about the benefits of joining the Union, left the group before the lunch break ended, and a few minutes later he was seen by Carballo talking to Woodruff. When lunch ended and the group returned to work, Carballo was assigned to work with Garniga. The very next day, Carballo was discharged for talking to the other employees during lunch breaks about safety issues and the Union.

The evidence viewed as a whole supports a reasonable inference that the Respondent through its agent actively engaged in unlawful surveillance. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 5 of the complaint.

F. *The Unlawful Interrogation*

Paragraph 7 of the complaint alleges that on July 11, 2003, Rick Sullivan unlawfully interrogated Miguel Carballo, after he was was fired and told to leave the jobsite, by asking him if he belonged to the Union.

It is well settled that interrogation is not illegal per se. To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference. The evidence shows that after Woodruff told Carballo that

he was fired and why, Carballo sought out Chris Rogers, the job superintendent, to ascertain whether he agreed with the discharge decision. When Rogers denied any involvement in the discharge decision, Carballo became upset and returned to Woodruff demanding his paycheck. Carballo was so agitated that Rogers called the military police as a precaution to escort off him the jobsite. In the meantime, Woodruff rebuffed Carballo's request for his last paycheck telling him that this was not a "Union f _king" job. At that point, Rick Sullivan, a supervisor, asked Carballo if he belonged to the Union to which Carballo responded affirmatively.

Rick Sullivan's question was asked in the presence of another supervisor, Woodruff, who knew that Carballo favored having a union. It was asked in the context of a discharge accompanied by a hostile exchange. There was no reason for Sullivan to ask the question other than to confirm their suspicions that Carballo was a union supporter, which was the articulated underlying reason for discharging him. Under the totality of the circumstances, I find that the interrogation was coercive and unlawful. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 7 of the complaint.

G. *The Unlawful Discharge*

1. The legal standard

In *Wright Line, a Div. of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that union activity was a motivating factor in the employer's decision[12]. Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage union activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that the reasons for its decision were not pretextual or that it would have made the same decision, even in the absence of protected concerted activity. *T&J Trucking Co.,* 316 NLRB 771 (1995).

2. The General Counsel's evidence

The undisputed evidence shows that Miguel Carballo is a paid Union organizer, who covertly applied for a job with the Respondent, was hired, and thereafter attempted to organize the employees by talking to them during lunch breaks about safety concerns and the benefits of joining the Union. A few days before Carballo was discharged, Robert Garniga, an agent of the Respondent, joined the lunchtime discussions and challenged Carballo's assertions about the benefit of belonging to a Union. Garniga's knowledge that Carballo was in favor of having union representation was therefore imputed to the Respondent. In addition, Garniga, who was perceived to be a boss by the employees, openly opposed Carballo's assertions about the Union which is additional evidence of animus. Finally, the credible testimony shows that Woodruff told Carballo that he was being fired for talking to the employees about safety and the Union.

[12] *In re Manno Electric, Inc.,* 321 NLRB 278, 280, fn. 12 (1996).

Based on the evidence viewed as a whole, I find that the General Counsel has satisfied its initial *Wright Line* evidentiary burden.

3. The Respondent's defenses

The credible evidence shows, and I have found, that at the time of discharge, Woodruff told Carballo that he was being fired for talking to his coworkers during lunch break about safety and the Union. Woodruff conceded that at the time of discharge he did not mention safety and poor performance as reasons for discharge. (Tr. 251.) At trial, however, Woodruff testified that Carballo was discharged for using his cell phone during working hours, working in an unsafe manner, and for not getting the job done. For the reasons below, I find that the reasons given at trial for discharging Carballo are nothing more than unsupported post hoc rationalizations.

According to Woodruff, it was his rule that employees were not allowed to use cell phones on the job, unless they first asked his permission. (Tr. 218.) He stated that he warned Carballo twice before about using a cell phone on the job. The third time he observed him using a cell phone, he discharged him. Woodruff admitted, however, that there was no Company policy prohibiting the use of cell phones on the job nor was any other employee discharged for using a cell phone during working hours. (Tr. 221, 223-224.) There is no evidence that Woodruff explained his rule to any other employee. Thus, the existence, promulgation, and enforcement of "his" rule are dubious.

In addition, the undisputed evidence shows that many employees used cell phones on the job during work hours. Chris Rogers, the job superintendent, testified that "[e]verybody carries cell phones these days and everybody is on them. It's a constant baby-sitting thing on a job site." (Tr. 268.) He further testified there were other employees using cell phones on the jobsite. Both Carballo and Vega corroborated Rogers' testimony on this point. Vega testified that Garniga would allow employees to use his cell phone while they were working, including Miguel Carballo. (Tr. 115-116.) Carballo testified that he observed other workers using a cell phone on the job. (Tr. 447-448.) He also testified that Garniga borrowed his cell phone to make a call on 4-5 occasions. (Tr. 421, 429, 436.) In the absence of any evidence showing that Woodruff told the employees that they needed permission to use a cell phone on the job, the evidence supports a reasonable inference that the Respondent encouraged and condoned the use of cell phones during work hours. *Electrical Workers Local 98 (MCF Service),* 342 NLRB No. 74, slip op. at 3 (2004) (a principal is liable for his agent's actions, even if the principal did not authorize or ratify the particular acts).

Thus, based on the evidence viewed as a whole, I find that the cell phone reason given at trial for discharging Carballo is unconvincing.

Equally unpersuasive is Woodruff's testimony that Carballo was discharged because he was an unsafe worker. Woodruff asserted that he counseled Carballo about walking around the top edge of a dumpster and observed him move a heavy metal door by himself. Contrary to Woodruff's assertions, however, the undisputed evidence shows that from the outset Carballo was a very safety conscious worker. He reported unsafe working conditions to Woodruff and complained about the insufficient supply of potable water for the employees, who worked in very hot and humid weather. In addition, Chris Rogers, who was also the jobsite safety officer, testified that he never issued a safety warning to Carballo and that he never observed him working in an unsafe manner. Rather, Rogers stated that Carballo always wore his safety glasses and hard hat and opined that Carballo was very conscientious about safety. (Tr. 265-266.) Vega, a co-worker, likewise testified that Carballo was a safe worker. (Tr. 102.) Thus, the evidence viewed as a whole does not support Woodruff's assertion that Carballo was an unsafe

worker which justified his discharge.

Finally, the assertion that Carballo's job performance was less than satisfactory is dubious. Woodruff gave general examples of tasks that Carballo purportedly was not satisfactorily performing. (Tr. 249-250.) Although he stated that he thought from the beginning that Carballo was not a hard worker, he unpersuasively testified that he did not take any action to address the issue because he was short of help.

Based on the evidence viewed as a whole, I find that the Respondent's post hoc reasons for discharging Carballo are pretextual. I further find that had it not been for his support of the Union, the Respondent would not have discharged Carballo. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) by discharging Miguel Carballo.

H. *Misconduct of the Respondent's Representative*

David M. Kelsey, J.D., appeared as the representative on behalf of the Respondent and was also called as a 611 (c) witness by counsel for the General Counsel. He is a corporate director and risk manager of the Respondent. (Tr. 341.) He also is the Company's custodian of records. (Tr. 342, 343.)

Throughout these proceedings, Kelsey repeatedly displayed inappropriate conduct, taking frivolous positions, and displaying disrespectful behavior, which prompted several warnings and admonishments from me, and eventually resulted in his removal from the hearing.

For example, the answer Kelsey filed on behalf of the Respondent admitted that the Respondent maintained a corporate office in Warrenton, Virginia, from which it annually performed services in excess of $50,000 in other states, but denied without good grounds for support that the Respondent was engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. As a result, the General Counsel served a subpoena *duces tecum* on the Respondent at its corporate headquarters in Warrenton, Virginia, seeking, among other things, financial information pertinent to establishing that the Respondent was engaged in interstate commerce within the meaning of the Act. Although Kelsey conceded that the Respondent received the subpoena, it failed to file a petition to revoke and refused to produce the documents. (Tr. 343-345.) Instead, at trial, Kelsey frivolously objected to the subpoena on the grounds that the records sought were kept in Western New York, and not Warrenton, Virginia, and therefore the subpoena should have been issued by the Board's Regional Office in Buffalo, New York, rather than the Board's Regional Office in Baltimore, Maryland. The objection was overruled and Kelsey was instructed to obtain the documents and deliver them to the hearing with dispatch. (Tr.13.) After that, he repeatedly stated that the documents were forthcoming, but as each day passed without the documents, he denied culpability and rendered sophomoric excuses for not producing the documents, thereby effectively ignoring my instructions. (Tr. 12-13, 137-138, 149, 313-314, 534-536.)

The answer prepared by Kelsey also denied that Eric Woodruff was a supervisor within the meaning of Section 2(11) of the Act, which required the General Counsel to call Woodruff and others to elicit testimony concerning his duties and functions. Woodruff's testimony showed that he satisfied several of the Section 2(11) indicia, including the authority to fire employees, and to assign, direct, and oversee the workforce using independent judgment. The baseless denial in the answer unnecessarily prolonged the hearing.

Throughout the hearing, Kelsey was warned and admonished several times for being disrespectful to witnesses, the interpreter, and counsel for the General Counsel. For brevity's

sake, I reference only a few examples here. Only a few minutes into the hearing, he was warned for being rude and discourteous after interrupting counsel for the General Counsel. (Tr. 6-7.) He proceeded to object to counsel's questions before the question was asked. (Tr. 79-81.) On more than one occasion, he interrupted the interpreter and questioned the interpretation of the witness' testimony. (Tr. 43, 72,102.) Several times, Kelsey was told to sit down, calm down, be quiet, and to stop shouting. (Tr. 46,139,166-167,168.) He was also warned about being rude and moving about when Counsel for the General Counsel was speaking. (Tr.139.)

Kelsey implied that witnesses were lying and referred to them as "snitches." (Tr. 54, 56, 58-59.) He accused Elberto Vega of being a member of the reputed MS 13 gang. (Tr.105, 110.) Kelsey was admonished for this conduct and was reminded that "[e]verybody who comes before a proceeding of the National Labor Relations Board is due respect. Everybody." (Tr. 284.)

He asked witnesses, like Irma Mercado and Elberto Vega, irrelevant questions, such as where they currently lived, where they were currently employed, whether they were in the United States legally, and what was their social security numbers. (Tr.51-52, 73-74, 103-104.) Although he was repeatedly warned about asking irrelevant questions and about dragging out the hearing, he nevertheless persisted in probing areas not relevant to the issues in the case. (Tr. 76-77,124-126, 231, 233-234, 294-297.)

Kelsey was admonished for making off-the-cuff gratuitous remarks on the record. (Tr. 286-290.) He was also told on more than one occasion to stop "thanking" me each time I made an evidentiary ruling favorable to the Respondent. (Tr. 47,173.) On the other hand, when I made a ruling unfavorable to the Respondent, Kelsey became sarcastic and disrespectful and was admonished more than once for doing so. (Tr. 164-165.) Ultimately, he was warned in very blunt terms that his sarcastic and disrespectful conduct would no longer be tolerated. When various telephone records were admitted into evidence over Kelsey's objection, which was noted on the record, he continued to press the issue, stating:

> Mr. Kelsey: Everything else got in, so why stop now.
>
> Judge Miserendino: Excuse me, sir.
>
> Mr. Kelsey: I said everything else got in, why should we stop now.
>
> Judge Miserendino: Mr. Kelsey, I have executed a lot of patience with you in this hearing. You've made a lot of off-the-cuff, improper, disrespectful remarks, and this is your last and final warning. One more outbreak from you, whether it's to me, it's to counsel, it's to the interpreter or a witness, and I'm going to exclude you from the rest of this hearing, and I'm going to order your company to get an attorney in here to represent the company for the rest of the case. I'm not going to tolerate it any longer. Do you understand me?
>
> Mr. Kelsey: I understand every word you're saying, Your Honor.
>
> Judge Miserendino: Well, I think you understand the full import of it also. You just constrain yourself from here on out.

(Tr. 446.)

Kelsey was admonished for yelling and was told to calm himself. (Tr. 460.) He continued to ask questions of little or no relevance to the issues of the case and was warned repeatedly to

move to a relevant line of questions. (Tr. 464, 470-474, 490, 511, 523, 527-528.) He was also warned about eliciting cumulative testimony. (Tr. 575.)

Eventually, Kelsey was excluded from the hearing. Board Rules § 102.77 (a). On the fifth day of the hearing, which could have been, and should have been, a two-day hearing, Kelsey was recalled by counsel for the General Counsel as a 611(c) witness. She asked Kelsey, among other thing, to identify any wage records for Rick Sullivan that should have been produced in response to the General Counsel's subpoena request no. 9.[13] After several minutes of questioning, it became readily apparent that no wage records for Rick Sullivan had been produced in response to the subpoena, a fact which Kelsey refused to acknowledge. (Tr. 675-677.) His lack of candor, unnecessarily delayed the proceedings, and evoked the following admonishment:

> Judge Miserendino: Don't get of[f] the issue. The issue is, you're supposed to tell us what's in the file, and if the – you don't have a document responsive to the request, you should've said so a long time ago, and you didn't do it. Throughout this trial, Mr. Kelsey, you have consistently played games. You've stalled, you've delayed, and this is just another example of it. Now, if you can't put your finger on something in any of those files because they don't exist, you ought to say so.
>
> (Tr. 677.)

Several minutes later, counsel for the General Counsel asked Kelsey why he was not a member of the Virginia Bar. Earlier in the proceedings, on day two, Kelsey testified, "I passed the Virginia State Bar. I went to law school. I just elect not to practice currently." (Tr. 342.) On day five, Counsel for the General Counsel again asked him:

> Q. Why aren't you a member of the Virginia Bar?
>
> A. I don't know so much that there's a reason, a particular reason.
>
> Q. I'm sorry?
>
> A. I withdraw my application?
>
> Q. You withdrew your application. Any other reasons?
>
> A. That's it.
>
> Q. Why did you withdraw your application?
>
> A. I was having some personal issues at the time, and it was an uphill battle to get through – I withdrew the application.

(Tr. 697-698.)

[13] At the end of the second day of hearing, Kelsey was directed to review all of the records that he, and he alone, as custodian of records produced in response to the subpoena, and to label documents responsive to each subpoena request nos. 9 and 10, before leaving the building for the day. (Tr. 346-348.)

Counsel for the General Counsel then proffered documents which were admitted into evidence showing that the Character and Fitness Committee of the Virginia Board of Bar Examiners, after considering evidence and testimony presented at an administrative hearing, recommended that the Virginia Board of Bar Examiners deny licensure to Kelsey because he did not have "the current requisite honest demeanor and good moral character and fitness to perform the obligations and responsibilities of a practicing attorney...." (GC Exh. 24 and 25.) Upon receipt of this evidence, I called a recess to review carefully the Bar Examiners' documents, reflect on the Kelsey's false and misleading testimony, and to determine the appropriate action to be taken in the context of what had transpired at the hearing over the past several days.

A careful review of the Bar Examiners' documents disclosed that the Character and Fitness Committee had determined that, among other things, Kelsey intentionally failed to disclose that he had been arrested and convicted for assault in the Henrico County General District Court. In addition the documents reflected that Kelsey had a past history of hostile and aggressive behavior, as well as a history of repeated acts of uncivil, inappropriate, and unprofessional conduct in connection with the unauthorized practice of law. Having made the decision to exclude him from the hearing based on his cumulative inappropriate conduct and his false and misleading testimony, it became apparent to me, based on the Bar Examiners' documents, that I was dealing with an emotionally unstable individual, who presented a potential danger to those in the hearing room, and that a pronouncement of his exclusion from the hearing could very well prompt an outburst accompanied by aggressive behavior. After calling for the presence of a security officer, I reconvened the hearing and stated the following:

> JUDGE MISERENDINO: Mr. Kelsey, from the outset of this hearing, your conduct has been extremely questionable. You have interrupted counsel on a number of times. You've interrupted the interpreter. You've interrupted the witnesses. You've cut it short, and you've already -- and you've yelled at me on numerous occasions. I've given you a number of warnings and admonishments, and I've used that term and pointed out your conduct. To a number of the witnesses, particularly the Hispanic witnesses, you've used extremely derogatory comments pertaining to their demeanor. You referred to them as liars. You accused Mr. Vega of being a murderer and a member of a murderous gang. I think your conduct, as displayed here this morning, with respect to the document production in response to General Counsel's subpoena, shows that you went out of your way to delay this process.
>
> At the beginning of the trial, as I pointed out, it was necessary for me to come in here and practically supervise turning over of documents that you said you were going to turn over, to provide them in a manner that is customary, identifying documents responsive to the request. You've disregarded my directions with respect to the document production request for 3 through 7. We had a discussion about the full force and affect of this agency's subpoenas. You told me those documents were coming from New York, they had arrived, they would be here by noon, they had to be reviewed by counsel, so forth and so on, only to find out later that none of that was true and that you weren't going to produce them. I think it's been very misleading. I think your conduct has risen to the level of being contemptuous (sic).
>
> And then we get here today, and in the course of discussion, the inquisition with respect to your background with the Bar, you lie under oath. And I

> specifically remember, on Tuesday, counsel asking you the questions, and my recollection of your testimony was that you passed the Bar and you didn't join the Bar because you didn't want to be restricted by some of the restrictions that attorneys have to abide by. We find that that's not true. I mean, I think that was a very misleading statement. I'm excluding you from further participation in this hearing on behalf of USA Remediation Services, Inc. The corporation will be directed to obtain another representative, and specifically someone who is familiar with the practice and procedures before the National Labor Relations Board, and to do so by filing an appearance by January 7th of 2005. I will issue an order to that effect. This trial will resume on January the 24th, Monday at 9:00 a.m. And we will begin with the Respondent's case-in-chief. And I mean 9:00 a.m. I don't mean 15 minutes after 9:00 or 9:20 or 9:10. Another indication of, really, your lack of responsiveness and extension of professional etiquette, not only to the profession, but also to me as the judge in this case. So without further ado, sir, I'm going to ask you to leave the building. Officer Tyrone will escort you out and you're not to come back in.
>
> We're off the record. I'll issue an order.
>
> (Off the record.)

(Tr. 700-702.)

The next day, December 14, 2004, I issued an Order, which was properly served on Respondent, explaining why Kelsey had been excluded from the hearing, and stating:

> On December 6, 2004, David M. Kelsey, the Respondent's vice president and corporate director, a non-attorney, formally entered his appearance on the record as the representative on behalf of the Respondent in these proceedings. On December 13, 2004, after being formally warned and admonished about his conduct on several occasions, David M. Kelsey was excluded from further participation as the Respondent's representative for misconduct, including, but not limited to, repeatedly interrupting other counsel, witnesses, and the interpreter; making derogatory comments to and about other counsel and witnesses; refusing and failing to comply with my instructions; engaging in conduct that was intended to unreasonably delay the trial; and lying under oath in a witness capacity as custodian of records for the Respondent.
>
> The Respondent shall select and appoint a new representative, who has experience with the practices and procedures of the National Labor Relations Board, and such representative shall enter a written appearance in these proceedings on behalf of the Respondent by no later than January 7, 2005. The written appearance shall identify the case(s) before this Agency that the representative has appeared or otherwise specify his/her experience with the practices and procedures of the Board.
>
> The trial in this case shall resume at 9:00 a.m., EST, January 24, 2005, in the Division of Judges Hearing Room, 5th Floor, 1099 14th Street, N.W., Washington, DC 20005.

(GC Exh. 26.)

I. *The Respondent's Failure and Refusal to Appear*

On January 7, 2006, no one entered a written appearance on behalf of the Respondent. On January 24, 2006, no one appeared for the Respondent when the hearing reconvened. The Respondent did not present a case-in-chief and it did not file a posthearing brief.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Laborers Mid-Atlantic Regional Organizing Coalition is not a labor organization within the meaning of Section 2(5) of the Act.

3. Eric Woodruff and Rick Sullivan are supervisors within the meaning of Section 2(11) of the Act.

4. Robert Garniga and Rick Sullivan are agents of the Respondent within the meaning of Section 2(13) of the Act.

5. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Engaging in unlawful surveillance of employees, who were engaged in activity protected by Section 7 of the Act.

(b) Coercively interrogating Miguel Carballo about his union membership.

6. The Respondent violated Section 8(a)(3) of the Act by discharging Miguel Carballo.

7. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged Miguel Carballo, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Special Remedy

Counsel for the General Counsel asserts that David M. Kelsey should be disciplined, pursuant Board's Rule § 102.21, for filing an answer which did not have good grounds for support and which was interposed for delay and that he should be disciplined, pursuant to Board's Rule § 102.177(e), based on his bad faith conduct at trial. I agree, although it is

questionable whether imposing discipline would deter similar future conduct by Kelsey, given his history of dishonesty and inappropriate conduct as reflected in the Virginia Board of Bar Examiners' report. I shall submit the allegations of misconduct to the investigating officer under Board's Rule § 102.177(e). *675 West End Owners Corp.,* 345 NLRB No. 27, slip op. at 3 (2005).

Counsel for the General Counsel, and the Charging Party Coalition, also argue that the extraordinary remedy of litigation fees and costs should be awarded under the "bad-faith" exception to the American Rule on litigation costs. *675 West End Owners Corp.,* supra, slip op. at 2-3 (August 2005); *Lake Holiday Manor,* 325 NLRB 469, 470 (1998). They assert two grounds in support of this position. First, the Respondent's defenses were frivolous because it failed to appear and present a defense at the conclusion of the General Counsel's case-in-chief. As the General Counsel acknowledges, however, the Board considers a defense "frivolous" when the position relies on testimony that presents no legitimate issue of credibility. *Heck's Inc.,* 215 NLRB 765, 768 (1974). Through cross-examination of General Counsel's 611(c) witness, Eric Woodruff, the Respondent asserted its reasons for discharging Miguel Carballo, which were discredited for the reasons stated above in III.C.4. Credibility Resolutions. Thus, on this basis, no ground exists for granting the remedy.

Next, counsel for the General Counsel and the Charging Party Coalition assert that litigation fees and costs should be awarded because the Respondent engaged in bad faith conduct during the litigation that was intended to frustrate and delay the proceedings. I agree. The Respondent denied allegations in the complaint pertaining to the commerce standard and the supervisory status of Eric Woodruff and Rick Sullivan, which should have, and could have, been admitted and which required the General Counsel to elicit evidence on these issues. It also failed and refused to produce documents responsive to a valid subpoena request, and in the process ignored my instructions, thereby unnecessarily delaying and extending the hearing. In addition, ample evidence exists showing that the Respondent's representative engaged in bad faith conduct throughout the entire course of the hearing, which unnecessarily extended the hearing, and resulted in the exclusion of the Respondent's representative, David M. Kelsey. Further, the Respondent ignored my Order by failing and refusing to appoint a replacement representative and failing and refusing to appear and present its defenses as part of its case-in-chief. I therefore find that Respondent shall reimburse the General Counsel and the Charging Party Coalition the costs and expenses incurred by them in the preparation, presentation, and conduct of the hearing, including reasonable counsel fees, salaries, witness fees, transcript and record costs, interpreter's fees and costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding.

Finally, the Charging Party Coalition seeks on the ground of "frivolous defenses," compensation for excess organizational costs involving the subsequent picketing of the Respondent at the Quantico Marine Corps Base and other jobsites. Because the "frivolous defenses" issue necessarily involved a credibility resolution, as noted above, I find no basis for granting this remedy to the Charging Party Coalition.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, USA Remediation Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in unlawful surveillance of its employees.

(b) Coercively interrogating employees about their union membership.

(c) Discharging Miguel Carballo because he engaged in union and protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Miguel Carballo, full reinstatement to his former position or, if such position does not exist, to a substantially equivalent position with substantially equivalent pay, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Miguel Carballo, whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including any electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Warrenton, Virginia, copies of the attached notice marked "Appendix"[15] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2003.

[15] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) Pay to the General Counsel and the Charging Party Coalition, the costs and expenses incurred by them in the preparation, presentation, and conduct of the hearing, including reasonable counsel fees, salaries, witness fees, transcript and record costs, interpreter's fees and costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, as determined at the compliance stage of this proceeding.

Dated Washington, DC March 15, 2006

_____

C. Richard Miserendino
Deputy Chief
Administrative Law Judge

JD–20–06
Warrenton, VA

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively interrogate our employees about their union membership.

WE WILL NOT engage in surveillance of our employees, while they participate in union and protected concerted activity.

WE WILL NOT discharge Miguel Carballo because he talked to other employees about the Union during lunch breaks and because he engaged in union and protected concerted activity.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT engage in bad faith conduct in any proceeding before the National Labor Relations Board.

WE WILL, within 14 days from the date of the Board's Order, offer Miguel Carballo full reinstatement to his former position, and if such position does not exist, to a substantially equivalent position with substantially equivalent pay, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, make Miguel Carballo, whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against him on July 11, 2003, less any net interim earnings, plus interest.

WE WILL, pay to General Counsel and the Charging Party Coalition the costs and expenses incurred by them in the preparation, presentation, and conduct of the hearing, including reasonable counsel fees, salaries, witness fees, transcript and record costs, interpreter's fees and costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding.

USA REMEDIATION SERVICES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.